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Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the annual report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, pursuant to Council resolutions 22/8, 29/9 and 31/3. The present report is the sixth and final annual report submitted to the Council by the current mandate holder. In the thematic section of the report, the Special Rapporteur assesses the developments that have taken place in connection with the principal issues addressed in each of his previous thematic reports, and makes recommendations for reform of the United Nations institutional architecture for addressing issues related to human rights and counter-terrorism.

* The report has been submitted late so as to reflect the most recent developments.

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I. Introduction

1. The present report is submitted to the Human Rights Council pursuant to its resolutions 22/8, 29/9 and 31/3.[1] In section II the Special Rapporteur details the key activities he has undertaken from March to December 2016; in section III he assesses the developments that have taken place in connection with the principal issues addressed in each of his previous thematic reports; and in section IV he makes recommendations for reform of the United Nations institutional architecture for addressing issues related to human rights and counter-terrorism.

II. Activities of the Special Rapporteur

2. Since the issuance of his previous report to the Human Rights Council (A/HRC/31/65), the Special Rapporteur took part in the activities set out below.

3. On 21 October 2016, the Special Rapporteur presented to the General Assembly his report on the impact of counter-terrorism measures on the human rights of migrants and refugees (A/71/384). The Special Rapporteur also held an interactive dialogue with the Assembly on the report.

4. On 9 November, the Special Rapporteur participated by videoconference in the interactive workshop with judges, lawyers, law enforcement officials and others who had contributed to the drafting of the policy and legal framework of a proposed counter-terrorism act for Sri Lanka, held in Colombo on 8 and 9 November.

5. On 20 and 21 November, the Special Rapporteur travelled to Saudi Arabia to hold preliminary talks with the Government to pave the way for a future official visit to the Kingdom. In Riyadh, he met with several senior government officials and was shown a central prison and a "consoling and care facility" for persons convicted of "terrorism". The Special Rapporteur was not in a position to conduct a full assessment of conditions of deprivation of liberty in these and other facilities in the Kingdom. He expressed a keen interest in undertaking an official country visit to Saudi Arabia in the first quarter of 2017, a proposal which was welcomed by the Government.

6. The Special Rapporteur continued to take action in response to communications, concerns and allegations received from individuals and organizations. He continued to pursue dialogue with Governments, including by sending requests for official visits. The Special Rapporteur thanks the Government of Tunisia for inviting him to undertake a country visit from 30 January to 3 February 2017. The report on this mission will be presented to the Human Rights Council in March 2018. He regrets that despite long-standing requests, no other invitations were received during the period under consideration.

III. Recent developments and thematic updates

A. Overview

7. The nature of international terrorism has changed beyond recognition during the course of the present Special Rapporteur's period of tenure in the mandate. The number of

[1] The Special Rapporteur would like to thank his Senior Legal Adviser, Anne Charbord, and his Legal Adviser, Jessica Jones, for their assistance with the preparation of this report.

extremist terrorist organizations has proliferated and their mode of operation has developed such that some now control large swathes of territory, have fractured the territorial integrity of States, are well funded and active in recruiting foreign terrorist fighters, and participate in protracted and widespread armed conflict. International terrorism now represents the single greatest threat to the United Nations twin goals of protecting international peace and security and promoting human rights. The consequences of terrorism remain dire, not only for those directly affected by the gross violations of human rights perpetrated by terrorist groups, but also more broadly, through proliferation of asymmetrical armed conflicts and massive displacement of civilians from areas controlled by terrorist groups.

8. Throughout his period of tenure, the Special Rapporteur has been acutely conscious of the daunting task facing States in discharging their positive obligation to protect their citizens and those within their jurisdiction from terrorist acts. It has long been recognized, however, that the purely security-based approach adopted by the Security Council in resolution 1373 (2001) was inadequate and has sometimes proved counterproductive. The protection of human rights must be central to any effective counter-terrorism strategy and the United Nations as a whole is now formally committed to mainstreaming human rights protection throughout its counter-terrorism initiatives. As the General Assembly noted in the United Nations Global Counter-Terrorism Strategy, effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing.[2] The Special Rapporteur underlines once again that States' counter-terrorism actions must be rooted in, and comply with, international law, including human rights, humanitarian and refugee law, and must address not only manifestations of terrorism but also conditions conducive to the spread of terrorism as identified in the Strategy.

9. Since assuming his role on 1 August 2011, the Special Rapporteur has developed the work of his predecessor on issues related to overly broad and vague definitions of terrorist offences and respect for guarantees of due process and the right to a fair trial. His thematic reports on the impact of the Office of the Ombudsperson on the Al-Qaida sanctions regime (A/67/396) and on the impact of counter-terrorism measures on the human rights of migrants and refugees (A/71/384) also built directly on the groundwork of his predecessor.

10. Where appropriate, the Special Rapporteur has focused on new and emerging issues such as the use of unmanned piloted aircraft in the context of counter-terrorism operations (A/68/389 and A/HRC/25/59) and the use of mass digital surveillance for terrorism purposes (A/69/397), human rights challenges in the fight against Islamic State in Iraq and the Levant (ISIL) (A/HRC/29/51) and the negative impact on civil society of measures to counter terrorism (A/70/371). He addressed the key question of accountability through development of framework principles for securing the accountability of public officials for gross or systematic human rights violations committed in the course of State-sanctioned counter-terrorism initiatives (A/HRC/22/52 and Corr.1). Finally, two of the Special Rapporteur's reports dealt with substantive topics he had identified as areas of interest in his initial report to the General Assembly (A/66/310), namely the rights of victims of terrorism, which led the Special Rapporteur to develop a set of framework principles for securing the human rights of victims of terrorism (A/HRC/20/14), and preventing and countering violent extremism as an aspect of the prevention of terrorism (A/HRC/31/65).

11. In carrying out his duties, the Special Rapporteur has engaged with Member States, civil society, victims and various United Nations entities, including the Counter-Terrorism Committee Executive Directorate, the Al-Qaida Sanctions Committee and the Counter-Terrorism Implementation Task Force. He has played an active part in the valuable human

[2] General Assembly resolution 60/288, annex.

rights work of the Task Force, notably by promoting its victims' rights agenda and by visiting Burkina Faso in 2013, one of the first three partnering Member States of the Integrated Assistance for Countering Terrorism (I-ACT) Initiative of the Task Force, which aimed to help interested Member States to implement the United Nations Global Counter-Terrorism Strategy. He has maintained regular liaison with the Counter-Terrorism Committee Executive Directorate and has twice addressed the Sanctions Committee in person. He has presented six annual reports to the Human Rights Council and six reports to the General Assembly. He has sent (alone or with other mandate holders) 177 communications to 77 Member States. He has also visited a considerable number of countries, including Canada, Colombia, France, Israel, Pakistan, Saudi Arabia, Spain and the United States of America, to meet officials, civil society organizations and victims or to attend seminars and give lectures.

12. Country visits are a critical aspect of the mandate as they allow for objective fact-finding on the basis of which assistance and advice can be given to States in their efforts to respect and protect human rights while countering terrorism. The Special Rapporteur is cognizant of the sensitivities associated with such visits. Yet the obvious risk of States' failure to respond positively to requests from the Special Rapporteur to carry out country visits is that the value of the mandate is undermined. It is thus a source of great regret that throughout his entire period of tenure, the Special Rapporteur has only been able to carry out two country visits, to Burkina Faso and to Chile. One further visit is pending, to Tunisia. All requests for formal country visits addressed to States other than these three have been met with an unfavourable response, a delayed response or no response at all. At the time of writing, a number of requests for country visits remain outstanding, notably to Afghanistan, Algeria, Egypt, Malaysia, Nigeria, Pakistan, the Philippines, the Russian Federation, Saudi Arabia, Sri Lanka, Thailand, Turkey and the United Arab Emirates.

B. Victims of terrorism

13. The Special Rapporteur welcomes some positive developments on this issue since his 2012 report (A/HRC/20/14), in particular the calls from the Human Rights Council to States to ensure that while countering terrorism any person who alleges that his or her human rights or fundamental freedoms have been violated has access to justice, due process and an effective remedy, and that victims of human rights violations receive adequate, effective and prompt reparations, which should include, as appropriate, restitution, compensation, rehabilitation and guarantees of non-recurrence.

14. In 2016, the Counter-Terrorism Implementation Task Force organized a high-level conference on the promotion and protection of the human rights of victims of terrorism. This conference, which took place on 11 February and at which the Special Rapporteur was a keynote speaker, made a significant contribution towards fostering a better understanding of the human rights of victims of terrorism and the ways in which States can better protect and support victims. The formulation by the United Nations Office on Drugs and Crime of "good practices in supporting victims of terrorism within the criminal justice framework" and the Madrid Memorandum on Good Practices for Assistance to Victims of Terrorism Immediately after the Attack and in Criminal Proceedings, adopted by the Global Counterterrorism Forum, are further positive steps in this area. Taken together with the Special Rapporteur's framework principles, these documents provide comprehensive guidance on the rights of victims of terrorism.

15. Serious challenges nonetheless remain. Perhaps the most significant is the continuing opposition of some States and prominent non-governmental organizations (NGOs) to accepting that non-State armed groups are subject to international human rights obligations. In the current global context, many of the gravest and most widespread human

rights violations are perpetrated by or on behalf of non-State armed groups. It is time for anachronistic classifications of the subjects of human rights law to be updated to reflect this reality.

16. No concrete steps have yet been taken to adopt an international instrument enshrining the rights of victims of terrorism. Such an instrument would contribute to a comprehensive and coordinated global counter-terrorism strategy and would ensure that victims of terrorism are not exploited by States for essentially political purposes. An example of this phenomenon is Human Rights Council resolution 31/30, titled "Effects of terrorism on the enjoyment of all human rights". The resolution was presented as a victim-centred initiative, but many commentators have seen this emphasis as pretextual. As one prominent NGO observed, the resolution "fails to respond to the needs of victims of terrorism, instead instrumentalizing them to weaken the international human rights system that is designed for their protection".[3]

C. Al-Qaida and Islamic State in Iraq and the Levant sanctions regime

17. Since the Special Rapporteur presented his report to the sixty-seventh session of the General Assembly (A/67/396), the Security Council, in resolution 2253 (2015), has expanded the remit of the Listing Committee to include ISIL, Al-Qaeda and associated individuals, groups, undertakings and entities. That resolution includes individuals who have no intention of supporting terrorist groups or the commission of acts of terrorism, such as those paying ransoms to listed individuals, as falling within the Committee's targeting strategy.

18. Current figures show that, since its inception, the Office of the Ombudsperson has delisted 45 individuals and 28 entities, while only 12 applications have been refused (see S/2016/671, para. 6). These figures underline the potential for error (or continuing error) and re-emphasize the need for fair and clear listing and delisting procedures that meet international standards of fairness. The Special Rapporteur welcomes Security Council resolutions 2083 (2012) and 2161 (2014), in which the Council mandated that decisions to delist or retain be accompanied by reasons provided within 60 days, as well as the practical improvements made to the Ombudsperson's website. He nonetheless regrets that despite these concessions to fairness and transparency, the Ombudsperson's comprehensive reports remain confidential. This is liable to impair petitioners' ability to efficiently present their cases (see S/2015/533, para. 39 and S/2016/96) and the ability of their representatives to comprehend past practice in order to assist their clients most effectively.[4] The Special Rapporteur welcomes recent steps taken to provide a new structure and status for the Office of the Ombudsperson (see S/2016/671, paras. 38-45).

19. The process remains, however, "unnecessarily opaque" (see S/2016/671, para. 48). It is regrettable that the Security Council still has not expressly addressed the issue of intelligence information that may have been obtained by torture,[5] and that access to information remains problematic. There is still no formal duty for States to provide all relevant information to the Ombudsperson and, despite the progress highlighted by the former and current Ombudspersons (see S/2015/533, para. 97 and S/2016/671), the regime

[3] Article 19, "UNHRC 31: States must reject flawed resolution on 'terrorism'", 22 March 2016; International Service for Human Rights, "Counter-terrorism: Egyptian-led resolution sends wrong message at wrong time", 4 April 2016.

[4] Statement by Catherine Marchi-Uhel to the Council of Europe Committee of Legal Advisers on Public International Law, 4 March 2016.

[5] Ibid.

still formally allows for the possibility that the petitioner (and even the Ombudsperson) may be kept in ignorance of information that is decisive to the outcome of a delisting petition (see S/2015/533, para. 43).

20. The Special Rapporteur reiterates his recommendation that an independent adjudicator be appointed with jurisdiction to review and overturn a designation by the Committee. Both the Grand Chamber of the European Court of Justice[6] and the Grand Chamber of the European Court of Human Rights[7] have ruled that where national courts are reviewing an individual's inclusion in a domestic sanctions list that implements the United Nations sanctions list, they must be able to obtain sufficiently precise information to enable them to determine whether the original listing by the Sanctions Committee was properly substantiated and not arbitrary. In the absence of such information, "national authorities may find themselves legally unable to fully implement the sanctions at the national level".[8] As the Special Rapporteur pointed out in his report to the General Assembly, that raises the risk that "targeted funds could begin migrating towards those jurisdictions that cannot lawfully implement the regime" (see A/67/396, para. 23).

D. Accountability of public officials for gross or systematic human rights violations committed in the course of State-sanctioned counter-terrorism initiatives

21. There have still been few effective investigations, prosecutions or other means of holding accountable individuals involved in the secret detention, rendition and torture of suspected terrorists by the United States Central Intelligence Agency (CIA) during the Administration of President George Bush. The Special Rapporteur shares the serious concern expressed by the European Parliament about the apathy shown by European Union member States and institutions with regard to recognizing the multiple fundamental rights violations and torture which took place on European soil between 2001 and 2006, investigating them and bringing those complicit and responsible to justice.[9] He also regrets the closure by the Council of Europe in February 2016 of its inquiry under article 52 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) into the roles played by European States in the CIA rendition programme, and the failure of the Detainee Inquiry, chaired by Sir Peter Gibson, in the United Kingdom of Great Britain and Northern Ireland to fulfil its mandate despite the indication in its interim report of possible government involvement in the ill-treatment of detainees[10] and in cases of rendition.[11]

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[6] Joined cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others v. Yassin Abdullah Kadi* (Kadi II), judgment of 18 July 2013.

[7] Application No. 5809/08, *Al-Dulimi and Montana Management Inc. v. Switzerland*, judgment of 21 June 2016, para. 140.

[8] "Fair and clear procedures for a more effective United Nations sanctions system", proposals to the Security Council by the Group of Like-Minded States on Targeted Sanctions, 12 November 2015.

[9] "European Parliament resolution of 8 June 2016 on follow-up to the European Parliament resolution of 11 February 2015 on the US Senate report on the use of torture by the CIA", document 2016/2573(RSP).

[10] "Documents indicate that in some instances [United Kingdom] intelligence officers were aware of inappropriate interrogation techniques and mistreatment or allegations of mistreatment of some detainees by liaison partners from other countries."

[11] "Documents indicate that Government or its Agencies may have become inappropriately involved in some cases of rendition."

22. On 9 December 2014, the United States Senate released the executive summary of the long-delayed Committee Study of the Central Intelligence Agency's Detention and Interrogation Program prepared by the Senate Select Committee on Intelligence chaired by Dianne Feinstein. The report confirmed that there had been a clear policy, orchestrated at a high level within the Bush Administration, authorizing the use of torture and the perpetration of other grave human rights violations on so-called high-value detainees. The Special Rapporteur considers that the United States was and remains under an obligation to ensure that the individuals responsible for this international criminal conspiracy are brought to justice and face penalties commensurate with the gravity of their crimes. The fact that the policies identified in the Feinstein report were authorized at a high level provides no excuse. Indeed, it reinforces the need for criminal accountability. International law prohibits the granting of immunities to public officials who have engaged in acts of torture, whether they were the actual perpetrators of these crimes or the senior government officials who devised, planned or authorized them. The United States is legally obliged, under binding international treaties, to bring those responsible to justice.

23. The Special Rapporteur welcomes the role of the European Court of Human Rights in shedding light on the complicity of various European States (including Italy,[12] the former Yugoslav Republic of Macedonia and Poland[13]) in the CIA programme, and notes the ongoing proceedings relating to Romania and Lithuania.[14] At the invitation of the President of the European Court of Human Rights, the Special Rapporteur appeared to present amicus curiae submissions in one of these cases in connection with the issues of accountability and the right to truth.[15]

24. The Special Rapporteur agrees with the United Nations Deputy High Commissioner for Human Rights that, in cases where counter-terrorism measures have resulted in human rights violations, "this injustice has been a rallying cry by violent extremist groups in recruitment of new supporters".[16] The Special Rapporteur thus welcomes the work of the newly created Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, and anticipates close future cooperation between the two mandates.

E. Use of remotely piloted aircraft in extraterritorial lethal counter-terrorism operations

25. In his 2013 report to the General Assembly (A/68/389) and his 2014 report to the Human Rights Council (A/HRC/25/29) on the lethal use of drones, the Special Rapporteur requested answers to eight disputed international legal issues from the States involved. No formal answers have been received to date, but the recent developments considered in this section may offer some embryonic direction.

26. The use of armed drones is not inevitably unlawful, but it must be subject to clear and public principles circumscribing their use, particularly in the context of evolving

[12] Application No. 44883/09, *Nasr and Ghali v. Italy*, judgment of 23 February 2016, para. 272.

[13] Application No. 28761/11, *Al Nashiri v. Poland*, and application No. 7511/13, *Husayn (Abu Zubaydah) v. Poland*, judgment of 24 July 2014.

[14] Application No. 33234/12, *Al-Nashiri v. Romania*, and application No. 46454/11, *Abu Zubaydah v. Lithuania*.

[15] *Al Nashiri v. Poland*.

[16] Statement by the United Nations Deputy High Commissioner for Human Rights at the panel discussion on the human rights dimensions of preventing and countering violent extremism, 16 March 2016, available from www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=17245&LangID=E.

technology, the increasing number of actors (including non-State actors) acquiring that technology and the prevalence of drone use in recent theatres of war in Iraq, Libya and the Syrian Arab Republic. The immediate impact is the loss of life of the targeted individuals, and bystanders, but the psychological effect on all communities in the affected region can have a serious impact on a number of other economic, social and cultural rights and fundamental freedoms. Procedural rights may also be affected (A/HRC/28/38). The Special Rapporteur thus welcomes the inclusion by the General Assembly and the Human Rights Council, in their respective resolutions on the protection of human rights while countering terrorism, references to the need to ensure that in their use of remotely piloted aircraft, States comply with their obligations under international law, including international human rights law and international humanitarian law.[17]

27. Since the Special Rapporteur issued his reports on this topic, the United States has published the "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations",[18] which gives detailed commentary on a number of legal and policy issues, including the position of the United States regarding its right to individual and collective self-defence when threats emanate from non-State armed groups in non-consenting States, and the question of "imminence" and definitions of "associated forces" and "areas of active hostilities".[19] Importantly, the document clearly upholds the position that international human rights law applies in times of armed conflict. In the United Kingdom, similar observations on the right of self-defence have been made by the Joint Committee on Human Rights in its May 2016 report[20] and the subsequent government response.[21]

28. In a significant recent speech to the International Institute for Strategic Studies, the Attorney General of the United Kingdom, Jeremy Wright QC, outlined for the first time some of the key principles that the United Kingdom considers applicable to the lethal use of armed force, including drones, in self-defence against the threat posed by non-State armed groups to the country or its allies. He indicated that the country's armed forces would only use lethal force for the purpose of targeted killing "when there is no other option to defend the country from attack and no other means to detain, disrupt or otherwise prevent those plotting acts of terror". All such strikes were to be carried out "in accordance with international law including international humanitarian law". As regards the threshold for determining whether an armed attack is "imminent", the United Kingdom would have regard to the nature and immediacy of the threat, the probability of an attack, whether the anticipated attack was seen as part of a concerted pattern of continuing armed activity, the likely scale of the attack and the injury that would be caused. Other factors that would be considered include the likely loss and damage in the absence of mitigating action, and the likelihood that there will be other opportunities to undertake effective action in self-defence that may be expected to cause "less serious collateral injury, loss or damage".[22]

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[17] See, e.g., Council resolution 29/9 and Assembly resolution 68/178.

[18] See www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf.

[19] Determinative of whether the 2013 Presidential Policy Guidance on Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities applies.

[20] House of Lords and House of Commons, Joint Committee on Human Rights, "The Government's policy on the use of drones for targeted killing", Second Report of Session 2015-16, 10 May 2016.

[21] House of Lords and House of Commons, Joint Committee on Human Rights, "The Government's policy on the use of drones for targeted killing: Government Response to the Committee's Second Report of Session 2015-16", 18 October 2016.

[22] See www.justsecurity.org/wp-content/uploads/2017/01/United-Kingdom-Attorney-General-Speech-modern-law-of-self-defense-IISS.pdf.

29. The use of lethal drones in accordance with international law requires transparency to the greatest extent compatible with national security. The Special Rapporteur therefore welcomes the publication by the United States Government in July 2016 of the "Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities" of the Director of National Intelligence. It provides the range of combatants killed (2,372-2,581) and the range of non-combatants killed (64-116) resulting from (473) strikes against terrorist targets outside areas of active hostilities (Afghanistan, Iraq and the Syrian Arab Republic) from January 2009 through 2012. The release of these figures by the Government is a significant step towards increased transparency; until then, almost all information about civilian casualty figures had come from non-governmental sources. The Special Rapporteur nonetheless notes that that the figures provided by the Government are very significantly lower than those tallied by civil society monitoring organizations.[23]

F. Mass digital surveillance for counter-terrorism purposes

30. The Special Rapporteur notes that the right to digital privacy addressed in his report to the General Assembly (A/69/397) has become a priority concern for the United Nations. In particular, the General Assembly, in resolution 71/199, addressed the right to privacy in all of its components and recognized its pivotal role in relation to other rights. A Special Rapporteur on the right to privacy has been appointed by the Human Rights Council, and issues of digital privacy are now regularly addressed by other human rights procedures,[24] treaty bodies[25] and mechanisms.[26]

31. Domestic and regional courts have also increasingly been called upon to consider issues of privacy and online surveillance. The Court of Justice of the European Union[27] has held that access on a generalized basis to the content of electronic communications compromises the "essence" of the fundamental right to respect for private life.[28] It has also ruled that mandatory retention of metadata[29] and national legislation which provides for "general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication" are contrary to European Union law.[30] The European Court of Human Rights requires demonstrable

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[23] See the figures provided by the Bureau of Investigative Journalism for Pakistan, Somalia and Yemen, available from www.thebureauinvestigates.com/category/projects/drones/drones-graphs/, as well as Human Rights Watch, "Airstrike transparency we can't believe in", 8 July 2016.

[24] For example, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (A/70/361, A/HRC/29/32 and A/HRC/32/38).

[25] For example, the Human Rights Committee (see CCPR/C/GRB/CO/7, para. 24 (c), CCPR/C/CAN/CO/6, para. 10 and CCPR/C/FRA/CO/5, para. 12).

[26] For example, the universal periodic review (A/HRC/29/15, A/HRC/30/12, A/HRC/31/12 and A/HRC/31/14).

[27] Grand Chamber, case C-362/14, *Schrems v. Data Protection Commissioner*, judgment of 6 October 2015.

[28] The Court also noted that the simple access to personal data by public authorities, even in the absence of any further processing of those data, was an interference in the right to privacy. This welcome position is also that taken in *American Civil Liberties Union v. Clapper* in the United States and in the *Privacy International* case in the United Kingdom.

[29] *Digital Rights Ireland v. Ireland*. On the decision's impact, see, e.g., the District Court of The Hague decision striking down the Dutch data retention legislation.

[30] Joined cases C-203/15, *Tele2 Sverige AB v. Post-och telestyrelsen* and C-698/15, *Secretary of State for the Home Department v. Tom Watson and Others*, judgment of 21 December 2016.

"reasonable suspicion" in the context of bulk interception[31] in order for a proportionality test to be performed.

32. At the national level, the United States bulk telephone metadata collection programme under section 215 of the Patriot Act[32] was declared illegal in the case of *American Civil Liberties Union v. Clapper*,[33] with the court finding that necessity and proportionality require that the data collected must be relevant to a particular investigation, not to counter-terrorism in general. In a related case, the United Kingdom Investigatory Powers Tribunal found in October 2016[34] that the regime for obtaining and retaining bulk communications data prior to government acknowledgement of that practice in 2015 was unlawful because it was not foreseeable.[35] In Germany, the constitutional court ruled that generally screening data across private and public databases in order to find potential terrorists ("sleepers") was illegal and could only be done where there is concrete danger to the lives or liberties of persons or to the State, based on factual indicators for an imminent attack, not a general threat level or foreign tensions.

33. These limitations have not, however, removed the serious and continuing concerns around extraterritorial mass surveillance programmes, and proliferation of laws that authorize asymmetrical protection regimes for nationals and non-nationals. Such laws exist in Germany[36], France[37] and the United States.[38] The Special Rapporteur recalls that differential treatment of nationals and non-nationals, and of those within or outside a State's jurisdiction, is incompatible with the principle of non-discrimination, which is a key constituent of any proportionality assessment (see CCPR/C/GBR/CO/7, para 24 (a) and CCPR/C/USA/CO/4, para. 24 (a).

34. Progress is still required to ensure that adequate procedural safeguards and oversight of interception and surveillance are in place. In particular, prior judicial authorization of

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[31] Application No. 47143/06, *Zakharov v. Russia*, judgment of 4 December 2015 and application No. 37138/14, *Szabo and Vissy v. Hungary*, judgment of 12 January 2016. See also, in Canada, Ontario Superior Court of Justice, *R v. Rogers Communications*, judgment of 14 January 2016, in which the Court produced a set of guidelines to ensure that orders to obtain customer information from telecommunications providers are proportionate.

[32] Using section 215 of the Patriot Act, the National Security Agency requested that the telephone metadata associated with telephone calls made by and to United States citizens be turned over in bulk by phone companies to be collected and aggregated into a repository or databank that could later be queried.

[33] United States Court of Appeals for the Second Circuit, judgment of 7 May 2015.

[34] *Privacy International v. Secretary of State for Foreign and Commonwealth Affairs and Others*, judgment of 17 October 2016. See also the critical "Review of directions given under section 94 of the Telecommunications Act 1984", July 2016, by the Interception of Communications Commissioner. See also European Court of Human Rights, application No. 24960/15, *10 Human Rights Organisations v. United Kingdom*, particularly the Applicants' Reply to Observations of the Government of the United Kingdom, September 2016.

[35] This case focused on the quality of the law, without considering whether the bulk data collection regimes were proportionate, per se. Note that the operational case for the use of bulk powers was examined by the Independent Reviewer of Terrorism Legislation, David Anderson, in the "Report of the Bulk Powers Review", August 2016.

[36] *Gesetz zur Ausland-Ausland Fernmeldeaufklärung des Bundesnachrichtendienstes*, adopted on 21 October 2016.

[37] *Loi n° 2015-1556 du 30 novembre 2015 relative aux mesures de surveillance des communications électroniques internationales*.

[38] Section 702 of the Foreign Intelligence Surveillance Amendments Act (due to expire in the summer of 2017) and Executive Order 12333, which is the primary authority under which the National Security Agency gathers foreign intelligence.

surveillance should be the norm.'" The Special Rapporteur welcomes the ruling of the Court of Justice of the European Union that access to retained data must be "subject to prior review by a court or an independent administrative authority" except in cases of "validly established urgency", and that the affected persons should be notified that access has been given to their retained data as soon as the notification is no longer liable to jeopardize investigations.[40]

35. On the right to an effective remedy, the Special Rapporteur notes the increasing number of court cases and parliamentary and other inquiries that are taking place into surveillance activities of intelligence agencies.[41] He regrets, however, that secrecy and lack of transparency continue to be impediments to meaningful accountability and redress for victims.[42] The Special Rapporteur welcomes important case law of the European Court of Human Rights that reaffirms the Court's broad approach to standing, and thus enhances the right to an effective remedy in the context of secret surveillance measures.

36. The fact that surveillance powers are contained in public legislation is crucial to satisfying the principle of legality. The Special Rapporteur thus welcomes efforts by States to place intrusive surveillance regimes on a statutory footing, so that they can be subjected to public and parliamentary debate. However, publicly available primary legislation is not, in itself, sufficient to ensure the compatibility of those regimes with international human rights law. Necessity, proportionality and non-discrimination must also be taken into account, along with the establishment of safeguards against arbitrariness, independent oversight and routes for redress. A significant number of States have recently adopted explicit surveillance legislation to address concerns about the legality of the operations of their security services. In this context, the Special Rapporteur gave a qualified welcome to the introduction of the United Kingdom Investigatory Powers Act 2016 on the ground that it at least made explicit and public provision for digital surveillance in primary legislation that was amenable to parliamentary debate. However, he remains concerned at the scope of some of the Act's provisions. It enshrines very broad targeted and bulk powers, including bulk interception, bulk acquisition, bulk equipment interference, "thematic" warrants and mandatory retention of communications and of Internet connection records, which can be

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[39] *Schrems* and *Digital Rights Ireland*, which deal with communications data, require prior independent authorization. See also CCPR/C/GRB/CO/7, para. 24 (c) and CCPR/C/CAN/CO/6, para. 10.

[40] *Tele2 Sverige AB v. Post-och telestyrelsen* and *Secretary of State for the Home Department v. Tom Watson and Others*.

[41] For example, in the United States, review by the Privacy and Civil Liberties Oversight Board, January 2014; the German parliamentary committee investigating the National Security Agency spying scandal, 20 March 2014; and the European Parliament inquiry into the activities of the National Security Agency. See also the classified report by the German data protection commissioner, which, albeit public only because it was leaked, shows that some oversight mechanisms are in place.

[42] In the context of a parliamentary inquiry into the activities of the National Security Agency, the constitutional court in Germany accepted the Government's position that it did not have to submit National Security Agency "selectors lists" to the inquiry, as the Government's interest in non-disclosure outweighed the inquiry's interest in receiving them. See www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-084.html;jsessionid=95A0F98064FE5CD7AA30A8362D516808.2_cid370. In France, in a case brought by several non-governmental organizations regarding a "confidential" presidential decree that would have allowed the secret services to undertake mass surveillance of international communications, the constitutional court — which has to date not rendered its decision — has been unable to confirm the existence of the decree, denied by the Government. Vincent Jauvert, "Comment la France écoute (aussi) le monde", *Le Nouvel Observateur*, 1 July 2015. See https://zonedinteret.blogspot.co.uk/2016/10/le-conseil-detat-se-penche-sur-le.html.

used nationally and extraterritorially, often without adequate judicial supervision.[41] Similarly, in France, a 2015 law gives the Government very broad powers to intercept electronic surveillance in the absence of judicial oversight and requires telecommunications carriers and Internet service providers to install "black boxes" on their networks.[42] The legislation has been criticized as providing the intelligence services with excessive, vaguely defined and highly intrusive surveillance powers, without adequate mechanisms of control and oversight (see CCPR/C/FRA/CO/5, para. 12). Similar legislation has been adopted,[43] or is in the process of adoption,[44] in many other countries.

G. International response to human rights violations committed by Islamic State in Iraq and the Levant

37. The situation relating to ISIL is complex and rapidly evolving. It is accused of committing genocide in the Syrian Arab Republic and of transnational attacks in Belgium, France, Germany, Indonesia, Tunisia and Turkey.[45] Human Rights Watch has recently characterized ISIL attacks on civilian targets in Iraq as amounting to crimes against humanity.[46] Recent reports continue to document war crimes and human rights violations committed by ISIL (A/HRC/31/68 and A/HRC/33/55), including indiscriminate bombing of densely populated or crowded areas, deliberate attacks on sites of cultural importance and attacks on medical and humanitarian workers, and grave violations of the human rights of those living in areas under ISIL control. This section focuses on selected developments since the Special Rapporteur's 2015 report to the Council, in the knowledge that the situation on the ground is likely to have changed further even before the present report is presented to the Council.

38. In June 2016, the Independent International Commission of Inquiry on the Syrian Arab Republic released a report in which it determined that ISIL had committed, and continued to commit, genocide against the Yazidis of Sinjar.[47] The Commission of Inquiry concluded that over 3,200 women and children were still being held by ISIL. Yazidi women and girls continued to be sexually enslaved and otherwise abused, and Yazidi boys indoctrinated and trained. Thousands of Yazidi men and boys were missing. Trade in women and girls by ISIL and its recruitment and use of boys never ceased. This finding should come as no surprise: in August 2014, action was taken by United States, Iraqi, British, French and Australian forces to "prevent a potential act of genocide";[48] in 2015, a report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) (A/HRC/28/18) referred to genocide, and in 2016, the European Parliament,[49] the

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[41] It has been qualified as giving United Kingdom "intelligence agencies and police the most sweeping surveillance powers in the western world", Ewen MacAskill, *Guardian*, 19 November 2016.

[42] *Loi n° 2015-912 du 24 juillet 2015 relative au renseignement*.

[43] For Switzerland, see www.humanrights.ch/fr/droits-humains-suisse/interieur/protection-securite/suisse-loi-renseignement.

[44] In the Netherlands, the bill for a new intelligence and security services act.

[45] According to the 2016 Global Terrorism Index, ISIL and groups that support it or are affiliated with it were active in 28 countries in 2015, compared with 13 in 2014. ISIL was also responsible for 6 of the 20 most deadly terrorist attacks in 2015, it killed 6,141 people with an average of 6.4 deaths per attack. See Institute for Economics and Peace, *Global Terrorism Index 2016*, pp. 12-13, 15 and 16.

[46] See www.hrw.org/news/2017/01/15/iraq-isis-bombings-are-crimes-against-humanity.

[47] "They came to destroy": ISIS crimes against the Yazidis".

[48] See www.whitehouse.gov/the-press-office/2014/08/07/statement-president.

[49] European Parliament resolution of 4 February 2016 on the systematic mass murder of religious minorities by the so-called "ISIS/Daesh", document 2016/2529(RSP).

Parliamentary Assembly of the Council of Europe,[72] the United States Secretary of State and the Parliament of the United Kingdom[73] all recognized that ISIL was committing genocide against the Yazidis, and possibly also Christian and other minorities, and called for States to fulfil their obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, notably by requesting the Security Council to refer the situation to the International Criminal Court.

39. The response to ISIL has continued to focus on military action and financial sanctions. Since the Special Rapporteur submitted his initial report, several additional countries have carried out air strikes in the Syrian Arab Republic, including Australia (S/2015/693), France (S/2015/745), Turkey (S/2015/563) and the United Kingdom (S/2014/851). These States have invoked the right to self-defence as the legal basis for their use of force on Syrian territory,[74] while the Russian Federation has invoked the principle of host State consent.[75] At its meeting on 14 November 2015, the International Syria Support Group was clear that a ceasefire "would not apply to offensive or defensive actions against [ISIL]" and that the December 2016 ceasefire similarly did not apply to action against ISIL.[76]

40. While some 6 million individuals still live under ISIL control,[77] it is estimated that the group had lost approximately 30 per cent of the territory it controlled in Iraq and the Syrian Arab Republic by September 2016.[78] As a result, its revenue has diminished, although its loss of natural resources has been compensated by an increase in revenue from other sources, including taxes, fees for the use of water, electricity and telephone, confiscation of the houses of those fleeing areas under its control, looting, fines on the population living under its control for violations of sharia, and kidnapping, including of religious minorities, women and children.[79] The comparative lack of dependence by ISIL on international financial transactions highlights potential limits on the efficacy of United Nations financial sanctions to respond to action in this core theatre of ISIL operations. However, the United Nations sanctions regime may prove more successful in limiting transnational operations by ISIL.

41. A comprehensive judicial approach commensurate with the gravity of the crimes committed on all sides of the conflict is more necessary than ever. Unfortunately, at present, the judicial approach is limited to a piecemeal criminalization of foreign terrorist fighters. The paralysing polarization of the Security Council has meant that it has failed to effectively address the deteriorating situation in the Syrian Arab Republic, which includes the duty to uphold peace and security by protecting civilian victims of terrorism and the duty to submit the situation to international justice. Given the range of documented grave violations of international law committed in the Syrian Arab Republic by a number of actors, it is shameful that they have thus far been carried out with absolute impunity. This is

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[72] Resolution 2091 (2016) on foreign fighters in Syria and Iraq.

[73] See http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7561.

[74] Security Council resolution 2249 (2015) stops short of authorizing action against Daesh but has broadened the bases on which States can claim self-defence as providing legal authority to act, at least with in the territories of the Syrian Arab Republic and Iraq.

[75] BBC News, "Russia joins war in Syria: five key points", 1 October 2015.

[76] See www.theguardian.com/world/2016/dec/29/syrian-government-and-rebels-have-signed-ceasefire-agreement-says-putin.

[77] BBC News, "Islamic State and the crisis in Iraq and Syria in maps", 30 November 2016.

[78] IHS Markit news release, "Islamic State caliphate shrinks by 16 percent in 2016, IHS Markit says", 9 October 2016.

[79] Centre for the Analysis of Terrorism, *ISIS Finances 2015* (Paris, 2016).

most seriously in the light of the evidence of genocide. There is a specific responsibility on all members of the Security Council to prevent this most serious of international crimes.[46]

82. Following six vetoes in the Security Council, the Special Rapporteur welcomes the resolutions adopted recently by the General Assembly in which the Assembly both demanded an immediate end to all hostilities in the Syrian Arab Republic[47] and established the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011.[48]

IV. Reform of the United Nations institutional architecture for addressing issues related to human rights and counter-terrorism

83. International terrorism has come to represent the greatest global threat to the twin goals of the United Nations: protecting international peace and security and promoting human rights. The distinctions between terrorism and armed conflict have been gradually eroded, with resulting confusion about applicable legal regimes. It is essential that the United Nations architecture be fit for purpose in meeting this growing challenge, in all its dimensions. The gravity, scale and urgency of the current threat is not, however, matched by the piecemeal institutional arrangements made by the Organization. At present, there are 38 United Nations entities with some form of responsibility for aspects of counter-terrorism policy. Despite the Organization's avowed intention to mainstream human rights protection throughout its counter-terrorism initiatives, this goal will remain elusive with the current proliferation of often under-resourced entities with overlapping responsibilities, and while there is no single coordinating body responsible for all aspects of counter-terrorism policy.

84. The United Nations needs to be able to deliver a coherent and comprehensive response to the security and human rights challenges posed by international terrorism, one which addresses (a) the need to promote the prevention and suppression of terrorism; (b) the interrelationship between terrorism and armed conflict; (c) the need to prevent the spread of violent extremism; (d) the need to engage with the conditions conducive to the spread of terrorism; and (e) the need to protect and promote human rights while countering terrorism — central to the Special Rapporteur's mandate. As the United Nations Global Counter-Terrorism Strategy makes clear, these objectives are inextricably intertwined and mutually dependent. They cannot be effectively addressed through the present patchwork of institutions, pursuing different core objectives and too often working in silos.

85. All four pillars of the Strategy are complementary. The only way in which it can be effective and have a positive impact internationally is by ensuring that all aspects of the Strategy are meaningfully and comprehensively implemented. Prior to delivering any technical assistance to partnering States, particularly on pillars II and III, the United Nations should be clear that it will objectively assess the human rights situation in the country concerned and offer the required assistance, as per pillars I and IV, as a sine qua non for the assistance to be effective. At present, this type of assessment is carried out only by the Counter-Terrorism Executive Directorate in the context of confidential country reports that do not see the light of day.

[46] Article I of the Convention on the Prevention and Punishment of the Crime of Genocide.
[47] Resolution 71/130.
[48] Resolution 71/248.

46. During discussions on the fifth review of the Strategy in 2016, a number of States called for the introduction of a new coordination mechanism to improve the work of the United Nations in the field of counter-terrorism and preventing violent extremism. In resolution 70/291 on the review, the General Assembly stopped short of recommending an immediate change to the United Nations architecture, but called for action to enhance the coordination and coherence of counter-terrorism activities across the four pillars of the Strategy, both at Headquarters and in the field. It also called on the incoming Secretary-General to review, in consultation with the Assembly, the capability of the United Nations system to assist Member States, upon their request, to implement the Strategy in a balanced manner.

47. The Special Rapporteur considers that urgent institutional reform is now called for, and welcomes the statement by the incoming Secretary-General that the United Nations needs to engage in a comprehensive reform of its strategy, operations and structures for maintaining peace and security, which should include a review of its work in the field of counter-terrorism and a better coordination mechanism among the 38 United Nations entities involved.[63]

48. The United Nations architecture for addressing terrorism must be sufficiently robust to meet current global realities. One such reality is that the distinctions between terrorism and armed conflict have been gradually eroded, particularly over the past six years. The pressing need for a centralized and coordinated approach at the United Nations level is well illustrated by the issues raised in the context of the conflicts in Iraq and the Syrian Arab Republic and, in particular, by the invocation by certain States of counter-terrorism as the justification for the use of disproportionate military force amounting to the commission of war crimes. The complexity of the legal and political framework attending asymmetrical armed conflict has resulted in language borrowed from criminal law, human rights law and humanitarian law being used interchangeably and ambiguously.[64] The term "foreign terrorist fighters" is perhaps the apex of the blurring of the concepts of terrorism and armed conflict that has occurred.

49. The mandate of the Special Rapporteur is the only entity of the United Nations explicitly and exclusively dedicated to the protection and promotion of human rights while countering terrorism. The Commission on Human Rights established the mandate in resolution 2005/80. It was then assumed by the Human Rights Council, and was extended in 2016 by resolution 31/3 for a further three years. The mandate includes communicating and exchanging information with all relevant sources on alleged violations of human rights and fundamental freedoms while countering terrorism, undertaking country visits and reporting to the Council and to the General Assembly. In addition, the mandate includes the provision of advisory services or technical assistance to States at their request; to identify, exchange and promote best practices; as well as to work in close cooperation and develop a regular dialogue with all relevant actors, particularly those within the United Nations that deal with counter-terrorism issues.

50. The mandate is unusually broad among the special procedure mandates, and is entrusted to consider all human rights that might be affected by counter-terrorism measures. The Special Rapporteur has encountered inconsistent levels of cooperation from States. The topics covered by his thematic reports and those of his predecessors are necessarily wide-ranging. The mandate also plays a role in the United Nations counter-terrorism infrastructure, as part of the Counter-Terrorism Implementation Task Force. Several

[63] Statement by the Secretary-General at his swearing-in ceremony, 12 December 2016.

[64] See, e.g., resolution 2170 (2014) and the statement by the President of the Security Council (S/PRST/2013/15).

working groups have been established under this framework, including one on human rights and the rule of law, which is co-led by OHCHR, and one on the rights of victims of terrorism, to which the Special Rapporteur has contributed. Reflecting on his work over the past six years, and given the complexity and urgency of the context in which the mandate operates, the Special Rapporteur considers that the time has come to say clearly that properly carrying out the duties of this mandate is an impossibly broad task for a stand-alone entity operating with limited OHCHR staff, on a part-time basis, with few resources and with severely limited operational authority.

51. The Special Rapporteur does not, of course, operate in a vacuum. There are four key United Nations entities whose work overlaps with the focus of the mandate. Critical human rights projects relating to counter-terrorism are also pursued (on a country-specific or ad hoc basis) by OHCHR, the Counter-Terrorism Implementation Task Force, the Counter-Terrorism Executive Directorate and the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime (UNODC), among other entities. However, the work of all these entities (including that of the Special Rapporteur) suffers from a lack of resources and a lack of central coordination. As a result, the objective of mainstreaming human rights protection throughout the United Nations counter-terrorism architecture is still a very long way from being fulfilled. What follows is a necessarily brief summary of the human rights work of the main United Nations entities concerned with counter-terrorism, which (in the opinion of the Special Rapporteur) illustrates clearly the need for the establishment of a single coordinating body.

52. OHCHR plays a central role and has conducted a number of highly successful ad hoc initiatives in recent years relating to human rights and counter-terrorism, including the report of the High Commissioner on the right to privacy in the digital age (A/HRC/27/37) and the ensuing panel discussion (A/HRC/28/39); a panel discussion on the use of drones in conformity with international law (A/HRC/28/38); the report of the High Commissioner on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/28/28); and a panel discussion on the human rights dimensions of preventing and countering violent extremism (A/HRC/33/28). OHCHR plays a critical role in delivering the human rights work of the Counter-Terrorism Implementation Task Force and also routinely promotes human rights issues in a counter-terrorism context through engagement by its regional offices in bilateral discussions with Member States at the diplomatic and technical levels. The Special Rapporteur has assisted in a number of these initiatives.

53. Many have questioned why the Task Force and the Executive Directorate should operate in parallel territory with potentially competing mandates. They point to the risks of duplication of effort and expense, overstaffing, inconsistent advice, and the emergence of a potential hierarchy of influence between the two bodies. In reality, however, the origins and mandates of the two bodies are essentially different. The Executive Directorate is an entity of the Security Council charged with monitoring and supporting the implementation of its counter-terrorism resolutions. The Task Force was originally established as a coordinating initiative of the Office of the Secretary-General, endorsed by the General Assembly, with a mandate to strengthen the coordination and coherence of counter-terrorism efforts of the United Nations system.

54. For many, the question remains why these two United Nations entities, both concerned with counter-terrorism and both required to promote human rights as part of their mandate, should be pursuing parallel but different initiatives, agendas and priorities. The short answer is that this is not comparing like with like. The Executive Directorate is an executive organ with a human rights element added onto its mandate. The Task Force is a coordinating mechanism that includes some human rights projects. Neither has the protection and promotion of human rights as a central objective. The concern of the Special Rapporteur is the extent to which the Task Force and the Executive Directorate and the

Terrorism Prevention Branch of UNODC can effectively ensure that human rights concerns remain at the forefront of the United Nations response to international terrorism. It is the Special Rapporteur's clear view that the Organization must be seen to speak with one voice on these vitally important questions. Any changes to the existing architecture must put human rights front and centre.

55. The Task Force engages in a range of international capacity-building initiatives which include some human rights components. The Special Rapporteur recalls that the objective of the engagement of the Task Force and its subentities with any State is to assist in the full implementation of the United Nations Global Counter-Terrorism Strategy. The Strategy, which should also guide the work of the Executive Directorate, places human rights in a position of prominence. However, prominence given to pillar IV in the work of the relevant United Nations entities has been sorely lacking, and until the former Secretary-General's recent initiative on preventing violent extremism, no serious attention had been paid to the critical issues raised under pillar I. The Special Rapporteur is clear that the commitments to human rights protection under pillars I and IV need to be further translated into the practice of the Task Force, the Executive Directorate and the Terrorism Prevention Branch.

56. Whereas OHCHR undertakes most of the human rights-related work of the Task Force, the Task Force should also be taking steps to facilitate the mainstreaming of human rights across its work. Yet there is insufficient evidence of any systematic audit of human rights mainstreaming by the entities that make up the Organization; there is little sign that Task Force entities have so far acknowledged or confronted some of the major contemporary challenges connected with compliance with international humanitarian law in counter-terrorism operations, and it is not part of the Task Force's mandate to conduct country assessments for human rights compatibility.

57. The working groups of the Task Force have served as a platform to raise human rights concerns, but have tended to focus on capacity-building and reporting of activities by individual entities rather than on substantive initiatives to improve policy coherence. Among the ongoing initiatives of the Task Force with a human rights focus are the creation of a support portal for victims of terrorism; a campaign to improve communications strategies for victims of terrorism; the conduct of a number of joint workshops with the Executive Directorate aimed at examining strategies to prevent the spread of violent extremism; the conduct of a gender-related analysis of the United Nations counter-terrorism initiatives; and a number of joint initiatives with OHCHR aimed at capacity-building in Member States through the translation and dissemination of information on best practices in countering terrorism. The working group project on human rights training for law enforcement in key countries over the last two years has been a notable success.

58. It is thus important not to underestimate the human rights work carried out by the Task Force in recent years. However, it can hardly be described as a coherent or prioritized central strategy, largely since the Task Force lacks the necessary mandate to conduct publicly available human rights assessments. Embedded within the Task Force is the generously resourced United Nations Counter-Terrorism Centre, which jointly develops, funds and implements counter-terrorism capacity-building projects. Set up with a donation of $100 million from Saudi Arabia, the Centre has so far paid insufficient attention to pillar I and IV issues in its work, concentrating primarily on questions of security and enforcement.

59. The executive work of the Security Council Counter-Terrorism Committee is conducted principally through the Executive Directorate, which was established in 2004 and became operational in 2005. The creation of the Executive Directorate was an opportunity for the Committee to move towards a more proactive position on human rights protection. The Committee was mandated to liaise with OHCHR in matters related to

counter-terrorism (S/2004/124). However, the Executive Directorate operates with only a very small contingent of relevantly trained staff. Between 2005 and 2013, it employed only one Human Rights Officer to cover its entire global mandate; a second was appointed in 2013. Taken alone, these staffing levels might not suggest that human rights protection has been a high priority in the Executive Directorate's programme of work. However, despite this obvious limitation, the Executive Directorate has striven to include human rights elements in aspects of its work.

60. In its regular reports to the Security Council on the work of the Counter-Terrorism Executive Directorate, the Counter-Terrorism Committee states that the Executive Directorate should take account of relevant human rights obligations (S/2005/800 and S/2006/989). In May 2006, the Committee adopted human rights policy guidance for the Executive Directorate and, according to its website, the latter "now routinely takes account of relevant human rights issues in all [its] activities, including country visits and other interactions with Member States". Concerns have, however, been expressed as to whether a body with a mandate to give effect to counter-terrorism measures enacted by the Security Council (including resolutions adopted under Chapter VII of the Charter of the United Nations), such as resolutions 1373 (2001) and 1624 (2005), is the ideal vehicle for promoting human rights protection in the counter-terrorism context, particularly when its assessments are not made public.

61. A good example of the Executive Directorate's reactive human rights work resulted from Security Council resolution 1624 (2005), in which the Council addressed incitement to commit terrorist acts. The Council stressed that States must ensure that any measures they take to implement the resolution must comply with international law, including international human rights law. It stressed in the preamble that such measures could pose a serious threat to freedom of expression. In response, the Executive Directorate established a working group on issues raised in resolution 1624 (2005) and the human rights aspects of counter-terrorism in the context of resolution 1373 (2001). The working group's main objectives are to enhance cooperation and human rights expertise among the staff of the Executive Directorate and to consider ways in which the Counter-Terrorism Committee might more effectively encourage States to comply with their human rights obligations. In resolution 2129 (2013), the Security Council encouraged the Executive Directorate to further develop its activities in the field of human rights and the rule of law to ensure that all issues relevant to the implementation of resolutions 1373 (2001) and 1624 (2005) were addressed consistently and even-handedly, including, as appropriate, on country visits that were organized with the consent of the visited Member State and in the delivery of technical assistance.

62. In practice, references to human rights standards are now to be found in much of the Executive Directorate's output, including its confidential country reports, its mandated reports to the Security Council, its global surveys on the implementation of resolutions 1373 (2001) and 1624 (2005) and its briefings to the Committee. The Executive Directorate aims to take human rights concerns into account during country visits and in other interactions with States, as well as in discussions with national human rights institutions and civil society. Human rights questions now comprise approximately 15 per cent of the coverage of the Executive Directorate's main assessment tool, the detailed implementation assessment, and current editions of the technical guides issued by the Executive Directorate for the implementation of resolutions 1373 (2001), 1624 (2005) and 2178 (2014) are being developed to include more substantial human rights elements. Nonetheless it would be difficult to categorize the human rights input in the Executive Directorate's programme of work as central or systematic.

63. There can be no doubt that the Executive Directorate's status as an entity of the Security Council lends weight to its recommendations to States in the field of human rights.

Nonetheless, the absence of a systematic and substantial human rights element in the Security Council's implementation machinery and the relative weight placed on human rights as against counter-terrorism and security policy are issues that raise real concern. In one view, the Executive Directorate is a body with teeth but which does not treat human rights as a frontline concern, whereas the Task Force is an umbrella body charged with implementing the Global Strategy through capacity-building initiatives that cannot hold States in any significant way to account for human rights violations and has not so far been able to mainstream human rights protection throughout its constituent entities. When all the threads are drawn together, there is simply insufficient emphasis on human rights protection in the United Nations counter-terrorism acquis. In the view of the Special Rapporteur, these considerations lend weight to arguments in favour of reforming the United Nations counter-terrorism architecture to establish a single coordinating body that puts the protection and promotion of human rights at the very heart of the United Nations counter-terrorism strategy.

64. The Terrorism Prevention Branch of UNODC has made significant efforts to include human rights elements in its legislative, capacity-building and technical assistance projects, covering such thematic issues as special investigation techniques, the use of the Internet for terrorist purposes, preventing the spread of violent extremism, countering the foreign terrorist fighters phenomenon, parliamentary supervision of counter-terrorism measures, extradition and mutual legal assistance, and the rights of victims of terrorism.

65. The Branch is currently engaged, jointly with the European Union and the Counter-Terrorism Executive Directorate, in an initiative on effective counter-terrorism investigations and prosecutions while respecting human rights and the rule of law in the Maghreb region; an initiative on criminal justice responses to foreign terrorist fighters for the Middle East and North Africa Region and the Balkan States; and a project on managing violent extremist offenders and preventing radicalization in prisons. Each of these projects has a human rights component. In addition, UNODC is implementing a dedicated human rights component in its global capacity-building programme, "Strengthening the legal regime against terrorism", which has involved the publication of training modules on criminal justice responses to terrorism; human rights in the investigation and prosecution process; human rights implications of criminalizing speech in support of violent extremism; human rights aspects of international legal cooperation and extradition; capacity-building for judicial and police training institutions; and a number of specific training initiatives on human rights and counter-terrorism in Kenya and Nigeria. UNODC has also recently begun a joint project with OHCHR to examine the gender dimension of criminal justice responses to terrorism.

66. The potential for overlap in the work of OHCHR, the Counter-Terrorism Executive Directorate, the Counter-Terrorism Implementation Task Force, the Terrorism Prevention Branch of UNODC and the mandate of the Special Rapporteur is obvious. On the basis of his experience in the mandate over the past six years and his interaction with other United Nations entities involved in counter-terrorism, the Special Rapporteur is firmly of the view that the United Nations architecture for dealing with counter-terrorism and human rights is in urgent need of reform: the various priorities should be brought under the responsibility of a new Under-Secretary-General for counter-terrorism coordination, with overall responsibility for counter-terrorism strategy and operating in close cooperation with OHCHR, so as to put human rights at the heart of all United Nations counter-terrorism initiatives.

67. A new office of Under-Secretary-General with a mandate to ensure human rights protection and to promote human rights-compatible responses to security challenges would serve to enhance the capacity of the United Nations to advance human rights as an integral component of security. It would also serve as a focused institutional engine for advocating

human rights concerns and the work of OHCHR in the area of counter-terrorism, making better use of limited resources. To ensure coordination and best practice, the new Under-Secretary-General would need to work closely with, and take advice from, OHCHR. Ideally, the new office holder should have proven experience in both security and human rights, and should assume coordinating responsibility for the work of the Counter-Terrorism Implementation Task Force, the Counter-Terrorism Executive Directorate and the Terrorism Prevention Branch of UNODC.

V. Conclusions and recommendations

68. **The present report summarizes progress made during the Special Rapporteur's period of tenure on the principal thematic issues he has addressed in carrying out the mandate. The Special Rapporteur is the sole entity within the United Nations counter-terrorism architecture that is exclusively charged with the specific responsibility of protecting and promoting human rights while countering terrorism. This situation has become unsustainable. The Special Rapporteur considers that it is impossible to adequately discharge the broad responsibilities of the mandate through a single stand-alone entity operating with limited OHCHR staff, on a part-time basis, with few resources, with severely limited operational authority and in the absence of effective human rights mainstreaming within the other entities that make up the United Nations counter-terrorism *acquis*.**

69. **The United Nations counter-terrorism architecture is in urgent need of reform. After reviewing the mandates and human rights responsibilities of the principal United Nations entities concerned with counter-terrorism, the Special Rapporteur strongly recommends the establishment of a new office of Under-Secretary-General for counter-terrorism coordination, whose responsibilities would include, at their core, the protection and promotion of human rights while countering terrorism and which would work in close cooperation with, and on the advice of, OHCHR.**